

FILED

December 27 2010

AF 07-0137

Ed Smith  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

AF 09-0688

**D. Scott Manning, Esq., Ph.D.**

P.O. Box 5043

Missoula, Montana 59806

(406) 721-3456

[scott@mtpropertylaw.com](mailto:scott@mtpropertylaw.com)

December 23, 2010

Montana Supreme Court  
Justice Building  
215 N. Sanders  
P.O. Box 203001  
Helena, MT 59620-3001

FILED

DEC 27 2010

Ed Smith  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Re: Comments to Proposed Changes to Montana Rules of Professional Conduct and Civil Procedure

To the Honorable Supreme Court of the State of Montana:

I am a member of the State Bar of Montana and the Western Montana Bar Association ("WMBA"). I am currently the Chairperson of the Pro Bono Program Committee of the WMBA. Our Pro Bono Program seeks to assist persons of limited means in obtaining legal assistance and to assist attorneys in meeting their pro bono publico service obligation under Rule 6.1 of the Montana Rules of Professional Conduct. While I do not write on behalf of the WMBA Pro Bono Program, I do write from the perspective of someone who has spent a great deal of time and effort trying to figure out how to make extremely limited volunteer legal services meet the constantly overwhelming needs of our community.

As I am sure you are aware, family law matters account for most of the unmet legal services needs of our limited and modest means populations. Based on statistical analyses of information provided by our volunteer attorneys and based on numerous conversations with attorneys, it is clear that most attorneys are willing to provide pro bono legal services on a limited basis. However, very few are willing to take on full representation in a family law matter. Attorneys are very uncomfortable taking on a no-fee family law matter when they have no idea how much of their time it will ultimately consume. We find that attorneys gladly volunteer for routine service in self-help clinics because they know what the time commitment will be and they know that it will not unreasonably interfere with their compensated obligations. We also find that many litigants are quite capable of representing themselves provided they have an opportunity to at least briefly consult with an attorney about substantive or procedural matters. A little help can go a long way.

My experiences in trying to organize a pro bono program leave me thoroughly convinced that clearly authorizing and regulating limited legal services will be very helpful in addressing unmet legal needs. For that reason I am supportive of the rule changes.

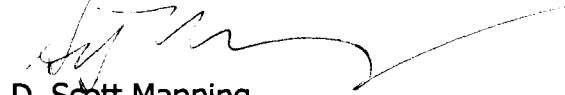
Before writing this letter I reviewed the comments submitted by Sue Talia, an expert on limited scope legal services. I found her comments in favor of the rule changes to be thorough and well reasoned. I also read, with dismay, the Ethics Opinion submitted by the State Bar Ethics Committee. The Ethics Committee seems to be oblivious to the fact that there are nowhere near enough resources to provide limited and modest means litigants with full legal representation. The fact is that limited and modest means litigants are seldom getting full legal representation and there is absolutely no reason to believe that will change in the foreseeable future. The Ethics Committee fails to understand that the real choice is increasingly between limited assistance and no assistance. With limited assistance most people can navigate the judicial system. With no assistance they flounder in frustration and clog the courts' dockets. It is disappointing that the Ethics Committee's Opinion fails to even mention the ethical obligation to provide pro bono publico services under Rule 6.1. We have a clear ethical obligation to provide these services and we need to find a way that really works. The perfect sought by the Ethics Committee should not become the enemy of the good sought by the rule changes.

I would like to suggest that some of the controversy over the issue of limited legal services arises from the use of the word "representation" to generally refer to any legal services provided by an attorney. While representation certainly has that general meaning, it also has a more specific legal meaning that has important practical and ethical implications. Section 28-10-101, MCA provides that: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." This Court has found that when attorneys represent their clients to third persons, including the courts, they are acting as agents. *See e.g. Kaeding v. W.R. Grace & Co.*, 1998 MT 160, ¶26. However, an attorney may legitimately serve a client by providing only confidential assistance and not representing the client to any third party. There is a substantial legal and practical distinction between merely offering advice and representing a client in interactions with adverse parties or the courts. Both require that the attorney exercise a reasonable standard of care, but the latter has numerous additional ethical and legal implications. *See e.g.* Title 28, Chapter 10, MCA and Rules 3.9, 4.2 and 4.3, Montana Rules of Professional Conduct and *Kaeding at* ¶26. It is these additional ethical and legal implications that make attorneys think twice about appearing on behalf of a client in a court action, particularly, if the client cannot pay. I would agree with the Ethics Committee's Opinion to the extent it suggests that when an attorney chooses to formally appear and "represent" a client in a court action, the attorney's standard of care is the same whether or not the client is able to pay the attorney's fees. However, that does not mean that there is anything unethical about an attorney declining to "represent" a client to a court and

third parties, but still providing competent, confidential assistance to the client. Often that is all the client needs. In order to make necessary legal services available to as many persons as possible, we should have rules that make it clear that it is acceptable to provide this kind of limited legal service.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Scott Manning', with a long, sweeping horizontal stroke extending to the right.

D. Scott Manning